

89-1868

No. —

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

.
GUADALUPE COUNTY,
Petitioner,
v.
LORELEI CORPORATION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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May, 1990



QUESTIONS PRESENTED

In an earlier appeal, before petitioner was a party, the Fifth Circuit reversed the district court's order of sale to satisfy a junior lien on the grounds the junior lien had been extinguished by a nonjudicial foreclosure of a first lien. However, the court said that the sale having been carried out pursuant to the order, in the absence of the giving of a required supersedeas bond pending appeal, it served to vest title to the land in the purchaser at the sale (petitioner). On the current appeal from a summary judgment confirming title in petitioner, the Fifth Circuit has held it is bound by its earlier opinion as the law of the case which settled the question of title to the land adversely to petitioner's claims; and that the court erred in holding the sale passed title to the land because the district court was without authority to require a supersedeas bond of an appellant who appeared only in post judgment proceedings.

1. Has petitioner been deprived of its property without due process of law where the title question was decided in a proceeding to which petitioner was not a party?

2. Where the only issue on appeal is the validity of a summary judgment confirming title in petitioner, is it a denial of due process for the court to decree title to be in respondent, thereby depriving petitioner of a trial on the merits?

3. Is the district court without authority to require the giving of a supersedeas bond under Rule 62(d) of an appellant who was not a party to the original proceedings?

LIST OF PARTIES

The parties to the proceedings below (the appeal to the Fifth Circuit Court of Appeals) were the petitioner Guadalupe County and the respondent Lorelei Corporation. The United States was granted leave to file a petition for rehearing.

The plaintiff in the U.S. District Court was the United States of America on behalf of the Small Business Administration. The defendants, at the time of judgment, were Vahlco Corporation, Frederick H. Vahlsing, Jr. and Magnum Machine and Tool Corporation. Margarita Oil Company, Ltd. and Lorelei Corporation appeared after judgment. Guadalupe County was granted leave to intervene at a later date.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner Guadalupe County respectfully prays that a writ of certiorari issue to review the decree and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 9, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 895 F.2d 1070 (5th Cir. 1990). An opinion dated April 11, 1990 on a petition for rehearing filed by the United States is unpublished. An earlier opinion dated October 16, 1985 arising out of the same case in the district court is also unpublished. Copies of all three opinions are reprinted in the appendix filed with this petition.

JURISDICTION

The opinion and decree of the Fifth Circuit Court of Appeals was dated and entered on March 9, 1990. A timely filed petition for rehearing was denied by order dated and entered on April 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation For Property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 62(d)

(d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

STATEMENT OF THE CASE

This controversy arises out of the purchase by Guadalupe County, at a United States Marshal's sale, of 10 acres of land to be used for the building of the new

Guadalupe County jail. At a sale held April 23, 1985, Guadalupe County was the high bidder and was awarded the property. The purchase price of \$125,000 was paid and on May 23, 1985, the land was conveyed to Guadalupe County by the United States Marshal. The property was sold pursuant to an order entered October 9, 1984 by the Honorable William S. Sessions, Chief Judge, in Cause No. SA-76-CA-106, *U.S. v. Vahlco Corp., et al.*, in the San Antonio Division of the Western District of Texas. (Appendix p. 26a).¹

Judge Sessions' order of October 9, 1984 was appealed by Margarita Oil Company and Lorelei Corporation, whose then status will be hereinafter discussed, to the Fifth Circuit Court of Appeals. For reasons which will also be hereinafter discussed, the Fifth Circuit, in an opinion dated October 16, 1985 in Cause No. 84-2617 (Appendix p. 12a), reversed the order of October 9, 1984 and remanded the cause for further proceedings in accordance with the opinion. However, in its opinion the court stated as follows, in Paragraphs 7 and 8:

7. Margarita and Lorelei were required to post a supersedeas bond pursuant to Fed. R. Civ. P. 62 by the district court in February, 1985. They failed to do so and did not seek a stay of the order of sale. By this time they were clearly parties to the case and when the property was sold by the Marshall in April of 1985, Lorelei was divested of the title to the property; and the title was then vested in the purchaser, who is said to be Guadalupe County. The proceeds of that sale are in the hands of the court.
8. We remand the case with directions to the district court to deliver the proceeds to Lorelei

¹ Jurisdiction of the district court was invoked under 28 U.S.C. § 1345, in that it is a civil action wherein the United States of America is plaintiff, based upon the claim of its Agency, Small Business Administration, pursuant to 15 U.S.C. § 631.

Corporation unless cause be shown to that court for further proceedings and/or a different disposition of the proceeds.

On May 2, 1986, Lorelei Corporation filed suit in the District Court of Guadalupe County against Guadalupe County, its County Judge and its County Commissioners, seeking to have the Marshal's Deed set aside and removed as a cloud on its title, as well as to recover damages for slander of title and exemplary damages. Guadalupe County sought and obtained an order staying the proceedings in the District Court of Guadalupe County while it sought to intervene in No. SA-76-CA-106 in the U.S. District Court, *U.S. v. Vahlco Corp., et al.* After its motion to intervene in the federal suit was granted, Guadalupe County filed a motion for summary judgment based on the proposition that since Lorelei had failed to supersede the order of sale pending appeal, and the order had therefore been fully carried out and the property conveyed to the high bidder at the Marshal's sale, the order could no longer be undone, and Lorelei's claims were limited to the proceeds of sale, which were in the registry of the court. By order entered October 6, 1987 (Appendix p. 19a), the Honorable William S. Sessions, Chief Judge, granted summary judgment in favor of Guadalupe County, holding that title to the 10 acres had vested in Guadalupe County, free of any claim by Lorelei Corporation. (The order also directed that the Marshal's Deed be reformed and that the Marshal execute and deliver a corrected deed.) After Judge Sessions' departure from the bench, various motions were heard and, by order entered April 21, 1989 (Appendix p. 16a), the Honorable Emilio M. Garza held that the order of October 6, 1987 granting summary judgment to Guadalupe County and ordering reformation of the deed was proper in all respects and Judge Garza thereupon entered final judgment in favor of Guadalupe County. It was from this order that Lorelei appealed to the Fifth Circuit Court of Appeals, resulting in that

court's opinion of March 9, 1990 (Appendix p. 1a), of which Guadalupe County herein seeks review. The case, *U.S. v. Vahlco Corp.*, is reported at 895 F.2d 1070 (5th Cir. 1990).

Cause No. SA-76-CA-106 was filed April 8, 1976 by the United States of America on behalf of the Small Business Administration to collect an indebtedness evidenced by two notes given by Vahlco Corporation to First National Bank of Seguin in the principal sums of \$10,000 and \$350,000. The notes were 90% guaranteed by the SBA, and, after default, were assigned to the SBA. The notes were secured by a second lien on the 10-acre tract of land ultimately sold to Guadalupe County. The first lien secured a note payable to the order of Seguin Savings Association. The other defendants (at the time of trial and judgment) were Fred H. Vahlsing, Jr., president of Vahlco and a guarantor of the indebtedness, and Magnum Machine and Tool Corporation, to whom the 10 acres in question had by then been conveyed. The case proceeded to trial before a jury on March 22, 1982. On the following day, March 23, at the conclusion of the government's case, Judge Sessions announced from the bench that he would direct a verdict in favor of the government, with certain issues to be taken under advisement. On April 7, 1982, a memorandum opinion and order granting the directed verdict was filed. Judgment was ultimately entered on June 7, 1982, with an amended judgment being entered June 11, 1982.

After the suit had been filed, Vahlsing had a company he controlled, Margarita Oil Company, Ltd., buy the first lien indebtedness from Seguin Savings Association. It was known by all parties at the time of trial that the SBA held a second lien and that the first lien was held by Margarita Oil Company. The United States sought foreclosure of its junior lien but sought only to foreclose it subject to the prior lien. After a directed verdict for the government had been announced from the bench but

before Judge Sessions had entered a written order that the property be sold to satisfy the second lien indebtedness, Vahlsing had Margarita Oil Company, Ltd. sell the property to satisfy the first lien indebtedness. This was accomplished by means of a trustee's sale, a nonjudicial foreclosure permitted under Texas law, which was conducted on June 1, 1982. Margarita bought the property in at the trustee's sale and Vahlsing then had Margarita convey the property to another company controlled by him, Lorelei Corporation, on June 4, 1982. No notice of the trustee's sale or the subsequent sale to Lorelei was given to the SBA or the United States; nor was this activity by Vahlsing and his companies disclosed to the court. The amended judgment of June 11, 1982 and the order of sale of the same date provided that, "The United States Marshal shall apply the proceeds of sale first to expenses of sale, then to the outstanding first real estate lien held by Margarita Oil Company, then to plaintiff's costs in this suit, and then to payment in satisfaction of this judgment as set forth herein." When the government learned of this activity by Vahlsing, Margarita and Lorelei, it filed a motion on July 19, 1982 to cancel the Marshal's sale then scheduled for the following day and to show cause why Margarita's nonjudicial foreclosure on the property should not be set aside. On July 19, 1982, Judge Sessions entered an order staying the Marshal's sale set for July 20 and ordering that Margarita Oil Company, Ltd., Magnum Machine and Tool Corporation, Frederick Vahlsing, Jr., Vahlco Corporation and Lorelei Corporation not dispose of, encumber or otherwise compromise the lien position of the United States of America as evidenced by the June 11, 1982 judgment until such time as the court holds a hearing to decide the rights and priorities of the parties with respect to their respective interests in said property. On November 18, 1983 (some 16 months later), Margarita and Lorelei filed a motion seeking a hearing on the court's order of July 19, 1982. On December 30, 1983, the United States filed a motion

for a resetting of the Marshal's sale and asking for a hearing on the motion. On January 16, 1984, Judge Sessions set a hearing on both motions for February 2, 1984. The hearing was held on that date.

The government contended at the hearing on February 2, 1984, that the conveyances from Vahlco to Magnum to Margarita to Lorelei were made for the purpose of thwarting the judgment of the U.S. District Court. The government also pointed out that shortly after the court announced a directed verdict for the plaintiff, Vahlsing filed for bankruptcy in the Southern District of Texas. The government had filed an adversary action in that proceeding objecting to Vahlsing's discharge on the grounds that some 19 corporations, including Vahlco, Magnum, Margarita and Lorelei, were his alter ego. An affirmative finding in the adversary action would automatically vitiate the trustee's sale by Margarita, because when Margarita acquired the note owed by Vahlco, there would have been a merger of estates which extinguished the first lien. At the conclusion of the hearing the court took both motions under advisement. The court provided that the order of July 19, 1982, restraining any disposition of the property by Lorelei, et al., would remain in effect until after a determination had been made as to a resetting of the foreclosure sale. Memorandum briefs were filed on the day of the hearing and thereafter.

On October 9, 1984, the court issued its opinion. (Appendix p. 26a). Judge Sessions ordered that the sale of the property should take place, with the proceeds of the sale to be placed in escrow pending the determination of whether Margarita Oil Company, Ltd. and Lorelei Corporation were in fact alter egos of Frederick Henry Vahlsing, Jr. The court further ordered that the Marshal apply the proceeds of sale, first to the expenses of sale, then to the outstanding first real estate lien in the amount and to the party as established by the court, such proceeds to be held in escrow pending further order of the

court. According to the government, the amount due on the first lien indebtedness was \$47,349.13. This figure does not appear to have been disputed.

Margarita and Lorelei appealed from the court's order, that being Cause No. 84-2617 in the Fifth Circuit Court of Appeals. On October 31, 1984, the appellants filed a motion for a stay pending appeal which was granted by the court by order entered November 9, 1984. On January 15, 1985, the government filed a motion asking that a supersedeas bond or other appropriate security be required of appellants Margarita and Lorelei. Margarita and Lorelei filed no response to the motion and, on February 22, 1985, the court granted the government's motion and ordered that Margarita and Lorelei post a supersedeas bond in the amount of \$250,000 within 10 days or the stay of the foreclosure sale would be lifted. (Appendix p. 24a) The docket entry shows that copies of the order were served on the attorneys. Margarita and Lorelei filed no response to the order and posted no bond. The stay being lifted, the U.S. Marshal proceeded to implement the court's order of October 9, 1984, by advertising the property for sale and subsequently selling it to the highest bidder, which was Guadalupe County.

On an appeal by Vahlco Corporation and Magnum Machine and Tool Corporation, the amended judgment of June 11, 1982 was affirmed by the Fifth Circuit. The case, *U.S. v. Vahlco Corp.*, is reported at 720 F.2d 885 (5th Cir. 1983). After his discharge in bankruptcy had been denied, Frederick H. Vahlsing, Jr. also appealed. The judgment against Vahlsing, as a guarantor, was reversed and the cause remanded to the district court where it is still pending, but is subject to the automatic stay arising out of Vahlsing's bankruptcy proceedings in the Southern District of Texas. That appeal, *U.S. v. Vahlco Corp.*, is reported at 800 F.2d 462 (5th Cir. 1986). The denial of Vahlsing's discharge in bankruptcy was appealed and reversed by the Fifth Circuit. That case, *In re Vahlsing*,

is reported at 829 F.2d 565 (5th Cir. 1987). An adversary proceeding by the Trustee in Bankruptcy is awaiting trial in the Bankruptcy Court for the Southern District of Texas to establish that Margarita, Lorelei, Magnum and Vahlco, among other corporations, are the alter ego of Vahlsing.

As previously stated, in its 1984 opinion in No. 84-2617, the Fifth Circuit reversed Judge Sessions' order of October 9, 1984 which ordered the property sold in spite of the nonjudicial foreclosure by Margarita of the first lien. The court pointed out that under Texas law, foreclosure of the first lien extinguishes the junior lien. The court then recognized that under Texas law where the mortgagor is the purchaser at the sale under a senior lien, the junior lien remains intact; also that the United States might establish its claim to the property under this rule if Margarita, Lorelei and Vahlco were determined to be the alter egos of Vahlsing, such a claim having been made in an adversary proceeding in the bankruptcy court. But the court said the "present record" contains neither pleading nor proof of such a claim.

Having said Judge Sessions' order of sale would be reversed, the Fifth Circuit then went on to say, as quoted above, that since Margarita and Lorelei failed to file a required supersedeas bond and the sale had been carried out, that Lorelei was divested of title to the land and title was vested in the purchaser, who was said to be Guadalupe County.

In its opinion of March 9, 1990, which is here under review, the Fifth Circuit construed its earlier opinion in No. 84-2617 and concluded that in the prior opinion the court had determined that the nonjudicial foreclosure by Margarita was valid, had extinguished the second lien held by the United States and that title was, accordingly, vested in Lorelei Corporation. Judge Sessions had no authority to order the sale of the property and the purported

sale by the Marshal and the Marshal's Deed were void and of no effect. The court held these findings were the law of the case, and that the issue of whether title was vested in Lorelei Corporation or Guadalupe County was no longer open to question.

The court held to be erroneous the statements made in Paragraph 7 of its opinion in No. 84-2617, holding that Judge Sessions had no authority to order the posting of a supersedeas bond by appellants, Margarita and Lorelei, who were non-parties. In remanding the matter to the district court, the Fifth Circuit ordered that the proceeds of the Marshal's void sale be returned to Guadalupe County; also that Lorelei and Guadalupe County "must now decide whether Lorelei will retain title and compensate the County for the improvements, will sell the tract to the County at a negotiated price, or will relinquish the land through condemnation for its current market value without improvements." (Appendix p. 6a). The only matter before the Fifth Circuit on this appeal was the validity of the summary judgment granted by Judges Sessions and Garza confirming that title to the land was vested in Guadalupe County. Lorelei Corporation had sought no summary judgment. (Two supposed motions for summary judgment "on behalf of Lorelei Corporation" which were filed by Vahlsing, pro se, had earlier been dismissed by the court without consideration on the merits.)

In its opinion, the Fifth Circuit stated that in response to Judge Sessions' order of July 19, 1982 that they not dispose of, encumber or otherwise compromise the lien position of the United States in the property, "Margarita and Lorelei, on November 18, 1983, filed a motion for hearing challenging the district court's jurisdiction over their interest in the land. *The district court did not respond and did not hold a hearing.* On October 9, 1984, the district court again ordered the Marshal to sell the property." Emphasis added. (Appendix p. 3a). This is a

misstatement of the record, perhaps influenced by the statement in Lorelei's brief that "The district court made no response to that motion of Margarita and Lorelei of November 18, 1983." (Brief of appellant Lorelei Corporation, p. 4). The court did respond by entering its order of January 16, 1984, setting a hearing on the motion for February 2, 1984 at 9:30 a.m. The hearing was indeed held at the appointed time. The fact of the hearing is reported on the docket sheet under that date where a summary is also given of the court's pronouncements at the conclusion of the hearing. The hearing is referred to in Judge Sessions' order of October 9, 1984 ruling on the matters taken under advisement. That the hearing was in fact held is directly confirmed by Margarita and Lorelei by statements made in their appellant's brief, at Page 3, in Cause No. 84-2617.

The Fifth Circuit also said that when Margarita and Lorelei refused to post a supersedeas bond, after having been ordered to do so, the district court lifted the stay, so that the Marshal's sale was then held. (Appendix p. 3a). Margarita and Lorelei did not *refuse* to post a supersedeas bond. They simply did not respond to the government's motion to require the bond. Judge Sessions pointed out in his order that it was the burden of the appealing party to demonstrate that a supersedeas bond is not required, citing *Popular Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979). (Appendix pp. 25a-26a). Neither did Margarita or Lorelei take any steps to avoid lifting of the stay during the 10-day period allowed for posting of the bond. Nor did either register any objection to the sale of the property during the 15-day period allowed for that purpose following the report of sale by the Marshal before the sale could be confirmed, as provided by the court's order of October 9, 1984. (Appendix p. 29a). Nor did Margarita or Lorelei seek a stay in the Fifth Circuit, as permitted by Rule 62(g) of the Fed. R. Civ. P., and Rule 8 of the Fed. R. App. P.

The United States filed a motion for leave to file a petition for rehearing on the grounds it had been adversely affected by the opinion of March 9, 1990. Leave to file the petition was granted but the petition itself was denied. The court said, in an opinion issued in that connection (Appendix p. 7a), that the United States had not been adversely affected because it had previously been adjudicated that the junior lien held by the SBA was extinguished by the foreclosure of the first lien. The court (inexplicably) quoted that portion of its earlier opinion which said, in effect, it might be possible for the United States to establish its claim to the property if the companies involved in the nonjudicial foreclosure were the alter ego of Vahlsing.

Guadalupe County's petition for rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS

According to the Fifth Circuit's construction on March 9, 1990 of its own earlier opinion of October 16, 1985, the title issue was then decided, and was decided adversely to Guadalupe County. Although Guadalupe County was not then a party, that conclusion was held to be the law of the case and binding on Guadalupe County as well as on the court itself. Accordingly, although the only issue on appeal was the validity of the summary judgment confirming title in Guadalupe County, the Fifth Circuit not only reversed Guadalupe County's summary judgment but decreed that title to the land is owned by Lorelei Corporation. Guadalupe County has been denied the opportunity to prove at a trial on the merits that the first lien was extinguished by the purchase by the mortgagor of the note he signed. (Guadalupe County's brief in support of its motion for summary judgment expressly recognized its claim to ownership based on this proposition, and the fraud claim, and that since both involved

fact issues, neither was being asserted as grounds for the summary judgment.) The reason for the denial of the right to a trial on the merits is the title finding made by the court at a time when Guadalupe County was not yet a party.

The law is well established that due process requires that before a party may be deprived of property, he is entitled to notice and an opportunity to be heard. *Hansberry v. Lee*, 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 28 L.Ed.2d 788, 91 S.Ct. 1434 (1971); *City of Port Arthur, Texas v. United States*, 517 F. Supp. 987 (D.C.D.C. 1981), *aff'd*, 459 U.S. 159, 74 L.Ed.2d 334, 103 S.Ct. 530 (1982). It may be that one who intervenes takes the case as he finds it and is bound by the record at that time. *State of Kansas ex rel. Beck v. Occidental Life Ins. Co.*, 95 F.2d 935 (10th Cir.), *cert. denied*, 305 U.S. 603, 83 L.Ed. 383, 59 S.Ct. 63 (1938). But in applying that general rule to this case, there are two important considerations. First, when Guadalupe County intervened, the law of the case included a finding that "when the property was sold by the Marshall in April of 1985, Lorelei was divested of title to the property; and the title was then vested in the purchaser, who is said to be Guadalupe County." Secondly, the opinion of October 16, 1985 clearly contemplated that the United States, which had then advanced the proposition of law which was later adopted by Guadalupe County, would have the opportunity to make its proof and establish the proposition, if able.

In its opinion of October 16, 1985, the Fifth Circuit cited the Texas cases holding that where the mortgagor was the purchaser at the sale accompanying the foreclosure of a senior lien, the junior lien remained unaffected. It then referenced the claim made by the United States in an adversary proceeding in Vahlsing's bankruptcy case to the effect that both Margarita Oil Com-

pany and Lorelei Corporation were alter egos of the original mortgagor.² The court then recognized it might be possible for the United States to establish its claim to the property on the grounds of the rule of law just stated, but that the present record contained neither pleading nor proof of the claim.³ The case was remanded to the district court with directions to deliver the proceeds of sale to Lorelei "unless cause be shown to that court for further proceedings and/or a different disposition of the proceeds." Obviously, since the court had found title to the property to be vested in Guadalupe County, the only remaining question was as to disposition of the proceeds of sale. If the United States was unsuccessful in its efforts to establish the alter ego claim, or its alternate claim of fraud, then all of the proceeds would be distributed to Lorelei Corporation. If the alter ego claim was established, then Lorelei (Vahlsing) would be entitled to no more than an amount equal to the first lien indebtedness. The opinion appears to have contemplated all of these things. For the Fifth Circuit now to hold that it was a final adjudication of title that forever bars Guadalupe County is a denial of due process.

² More specifically, the contention is that Vahlco Corporation, Magnum Machine and Tool Corporation, Margarita Oil Company, Ltd. and Lorelei Corporation, together with certain other companies, are all the alter ego of Frederick H. Vahlsing, Jr. If so, then a purchase at the trustee's sale by Margarita (Vahlsing) of property mortgaged by Vahlco (Vahlsing) would, under the Texas law, have no effect on the second lien, other than elevating it to first lien status. However, the first lien would actually have been extinguished when Margarita (Vahlsing) purchased from Seguin Savings Association a note executed by Vahlco (Vahlsing). The debt would then have been owed by Vahlsing to himself and would have been extinguished as well as the lien securing it.

³ These allegations by the United States arose out of events which occurred after trial and were made after Vahlsing had filed a petition in bankruptcy on March 29, 1982. The automatic stay of proceedings against Vahlsing became effective at that time.

II. SUPERSEDEAS BOND

It is a general rule of appellate procedure that the "consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final. . ." 9 Moore's Fed. Practice ¶ 208.03 at 8-9 (2d ed. 1990); *American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245 (5th Cir. 1980). Where the appealing party fails to obtain a stay pending appeal and the action complained of is accomplished, the appeal becomes moot and may be dismissed. *American Grain Ass'n v. Lee-Vac, Ltd.*, *supra*. The rule has been frequently applied where a debtor in bankruptcy fails to obtain a stay pending appeal from an order lifting the automatic stay to permit a creditor to foreclose on property owned by the debtor. If the creditor proceeds to foreclose and sell the property, the appeal is dismissed as moot. *In re Matos*, 790 F.2d 864 (11th Cir. 1986); *Markstein v. Massey Assoc., Ltd.*, 763 F.2d 1294 (11th Cir. 1984); and *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). It has also been applied in other cases, such as where shareholders have sought to enjoin the sale or merger of corporations which, in the absence of a stay pending appeal, were consummated in the interim and the appeal then dismissed as moot. *Fink v. Continental Foundry & Machine Co.*, 240 F.2d 369 (7th Cir.), *cert. denied*, 354 U.S. 938, 1 L.Ed.2d 1538, 77 S.Ct. 1401 (1957); *Brill v. General Industrial Enterprises*, 234 F.2d 465 (3d Cir. 1956); and *Kelaghan v. Industrial Trust Co.*, 211 F.2d 134 (1st Cir. 1954). The Fifth Circuit was apparently relying on this rule, although no authorities were cited, when it stated in its opinion of October 16, 1985 that when Margarita and Lorelei did not seek a stay of the order of sale and the property was sold by the Marshal, Lorelei was divested of the title to the property. Although Judge Sessions cited no authority, he apparently relied on this rule in entering summary judgment for Guadalupe County. In his order of October 6, 1987, Judge Sessions

said, "Accordingly, after this Court had ordered that the certain 10-parcel acre of real estate be sold, Lorelei Corporation, clearly a party to the proceeding, had every opportunity to post a supersedeas bond to stay the foreclosure sale pending appeal. Lorelei Corporation, however, chose not to do so and the property was sold wherein the County of Guadalupe was the highest bidder. Consequently, Guadalupe County is entitled to summary judgment in its favor on its motion entitling it to the property in question." (Appendix p. 21a). (Contrary to the implication in the Fifth Circuit's opinion of March 9, 1990, Judge Sessions did not appear to rely on the "law of the case" as established by the Fifth Circuit's opinion of October 16, 1985. However, Judge Sessions did say, "This result, although it may or may not be controlled by the October 16, 1985 opinion of the Fifth Circuit in this cause, is entirely consistent with that opinion.")

In its opinion of March 9, 1990, the Fifth Circuit escapes application of the rule just discussed by two pronouncements of law, both of which are stated without citation of authority. First, the court says that its prior finding that Lorelei was a party to the suit is clearly in error. Second, the court finds it would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond.

With respect to the first finding, the court says "the district court's docket sheets indicate unequivocally that contrary to the finding in paragraph seven Lorelei was not a party to the SBA suit in February 1985 when Lorelei was ordered to post the supersedeas bond." (Appendix p. 5a). The docket sheet shows that on November 18, 1983 Margarita and Lorelei filed a motion for a hearing on the court's order of July 19, 1982 (docket entry 151). On February 2, 1984, they attended a hearing on their motion and a motion by the United States to reset the foreclosure sale. On February 2, 1984, a memorandum brief was filed (docket entry 154) and on February

6, 1984, a supplemental memorandum brief by Margarita and Lorelei was filed (docket entry 155). On October 26, 1984, Margarita and Lorelei gave notice of appeal (docket entry 157) and on October 31, 1984, filed a motion for stay pending appeal (docket entry 158), and a memorandum in support of the motion for stay (docket entry 159). On November 13, 1984, Margarita and Lorelei filed a request for findings of fact and conclusions of law (docket entry 163). Whether or not these docket entries unequivocally show Lorelei was not a party in February 1985 when the supersedeas bond was required, they also show, unequivocally, that Lorelei did appear in the cause, sought relief from the court, argued its position and appealed from an unfavorable result.

The court's statement that "it would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond in the amount of the judgment in the suit to avoid execution upon the property" (Appendix p. 6a) might well be true as an abstract proposition. But it does not apply to this case. First, the bond required here was not in the amount of the judgment in the suit nor was it to avoid execution upon the property. It was set at \$250,000 which was apparently based on an estimate of the value of the 10 acres at the time. The order (Appendix p. 24a) provided that if the property was ultimately sold at a lesser figure, the bond would be used to supplement the proceeds of sale. It was not to avoid an execution but to stay operation of the order of sale pending appeal. More importantly, Lorelei Corporation was other than just a property owner. It became an owner of this property only after the court had announced from the bench on March 23, 1982 that judgment would be entered for the United States and that the property would be sold to satisfy the debt due the SBA. There has never been a contention that Lorelei Corporation was a bona fide purchaser for value. Quite to the contrary, it acquired the property

with full knowledge of the fact the court had determined that the property was to be sold to satisfy the judgment granted to the SBA and of all of the attendant circumstances. Lorelei had knowledge because F. H. Vahlsing, Jr., as a party defendant, had knowledge, and up until May 8, 1982, F. H. Vahlsing, Jr. was the sole director and president of Lorelei Corporation. As of May 8, 1982, Vahlsing, as the sole director, had new officers appointed for Lorelei Corporation. This was after trial on March 22-23 and Judge Sessions' pronouncement from the bench, and would have been about the time Vahlsing was having Margarita Oil Company post the property for trustee's sale on the first Tuesday in June. Whether or not Lorelei Corporation was then the alter ego of Vahlsing, it acquired this property with full knowledge that the property was about to be sold under order of federal court to satisfy a judgment for the indebtedness due the SBA.

Rule 62(d) provides that when an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay. The rule does not expressly make any distinction between one appellant or another; that is, between an appellant who was an original party and an appellant who may have had some lesser role in the litigation. We have found no cases suggesting that an appellant of any classification, other than the United States and certain related parties, as provided by Rule 62(e), is entitled to a stay as a matter of law without giving a bond. The Fifth Circuit has held that the district court was without authority to require a supersedeas bond as a condition to granting a stay in the instant case. Specifically, the Fifth Circuit seems to have held that the district court has no discretion to require a supersedeas bond of a property owner who appeared in the proceedings after judgment. To the contrary, we think rule 62(d) contemplates that the district court will exercise its discretion in deciding whether, under all of the circumstances, a supersedeas bond should or not be required. The instant case is an excellent example. Having held a hearing at which the

parties advanced their arguments, Judge Sessions was thoroughly familiar with the facts of the case and the rights and priorities of the parties with respect to their respective interests in the property. He understood that the rights of Margarita and Lorelei could be adequately protected so long as the proceeds of sale remained intact, because a lender is entitled to no more than payment of the debt, and that could be accomplished. He originally stayed the sale pending appeal, but when the government filed a motion and advanced its arguments as to why a supersedeas bond should be required, and Margarita and Lorelei filed no response to the motion, Judge Sessions proceeded to enter his order of February 25, 1985. The order recites that the burden is on the appellants to show why no bond should be required and that they had not done so. (Appendix pp. 24a-25a). Lorelei still could have objected to that order, or sought a stay in the Fifth Circuit, or it could have objected to the sale by the marshal before the deed was executed, but Lorelei did none of these things. The question of whether the district court had authority to require the bond was never raised at all in the trial court.

There undoubtedly will be other appeals involving orders of district courts which affect the rights of parties other than those to the original proceedings, and it is important that district courts have the discretion where the circumstances are appropriate to require the giving of supersedeas bonds as a prerequisite to staying the order pending appeal. Because this is an important question of federal law which has not been, but should be, settled by this Court, as well as to rectify an injustice in the instant case, the Court should grant the writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be granted because the March 9, 1990 opinion and decree of the Fifth Circuit has deprived Guadalupe County of property with-

out due process of law; also because whether the district court has authority under rule 62 to require that an appellant who is a party only to a post judgment proceeding file a supersedeas bond as a prerequisite to a stay pending appeal is an important question of federal law which has not been, and should be, decided by this Court. To our best knowledge, the only published opinion on that point at this time is the opinion here under review. It holds that the district court does not have that authority, even where the question of the court's authority was not raised in the district court.

Respectfully submitted,

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May, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 89-5556

• UNITED STATES OF AMERICA,
v. *Plaintiff,*
VAHLCO CORPORATION, *et al.,*
Defendants,

LORELEI CORPORATION,
Intervenor-Appellant,
v.
GUADALUPE COUNTY,
Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Texas

March 9, 1990

Before CLARK, Chief Judge, POLITZ and WILLIAMS,
Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In this case, we consider the interests of claimants to ten acres of land situated in or near Seguin in Guadalupe County, Texas.

Facts and Prior Proceedings

The relevant history of the ten-acre tract begins in the early 1970's when Vahlco Corporation owned the land. In February, 1972, Vahlco executed a note secured by a deed of trust on the property to Seguin Savings Association. In August, 1973, Vahlco executed a note secured by a deed of trust on the property to First National Bank of Seguin. In December, 1973, Vahlco executed another note to FNB Seguin.

In 1974, Vahlco transferred the property to Magnum Machine & Tool Corporation. Magnum's title, of course, was subject to the first lien held by Seguin Savings and the second lien held by FNB Seguin.

In February, 1976, FNB Seguin assigned its second lien to the Small Business Administration. In April, 1976, the SBA sued Vahlco, Magnum, and Frederick H. Vahlsing. In August, 1976, Margarita Oil Company, Ltd. purchased the first lien rights from Seguin Savings. Thus, as of August, 1976, Magnum owned the ten acres subject to a first lien held by Margarita and a second lien held by the SBA. Also, the SBA in the name of the United States had instituted an action on the second lien.

On June 1, 1982, Margarita foreclosed on the first lien and purchased the land at the foreclosure sale. Margarita then sold the tract to Lorelei Corporation on June 4, 1982.

On June 6, 1982, the district court entered judgment in favor of the SBA in the SBA's suit on the second lien. On June 11, the district court vacated the June 6 order and issued an amended judgment. The amended judgment ordered that: (1) the SBA's second lien was foreclosed, (2) the United States Marshal must seize the ten-acre tract for sale at public auction, (3) the proceeds of sale were to be distributed first to expenses of the sale, second to Margarita in satisfaction of its first lien, third to the SBA's cost of suit, and fourth to the SBA in satisfaction of its judgment.

On July 19, 1982, the district court stayed the order of sale and ordered Margarita and Lorelei:

not [to] dispose of, incumber or otherwise compromise the lien position of the United States of America as evidenced by the June 11, 1982 judgment until such time as the Court holds a hearing to decide the rights and priorities of the parties with respect to their respective interests in said property.

In response, Margarita and Lorelei, on November 18, 1983, filed a motion for hearing challenging the district court's jurisdiction over their interest in the land. The district court did not respond and did not hold a hearing. On October 9, 1984, the district court again ordered the Marshal to sell the property.

Margarita and Lorelei appealed the October 9 order of sale to this Court and requested a stay of the sale pending appeal. The district court granted the stay on November 9, 1984.

Three months after granting the stay, the district court ordered Margarita and Lorelei to post a supersedeas bond. When Margarita and Lorelei refused, the district court lifted the stay. On April 23, 1985, the Marshal sold the land at public auction to Guadalupe County. The Marshal's deed recited that the Marshal transferred to Guadalupe County "all the right, title, interest, and claim which [Vahlco], on the day of the sale, . . . had in and to the . . . tract of land. . . ."

In an unpublished opinion, we reversed the sale on the ground that the SBA's second lien had been extinguished when Margarita foreclosed its first lien. We then held, however, that Lorelei had become a party to the suit and was divested of its title when it failed to file a supersedeas bond as ordered by the district court. We remanded the case, directing the district court to distribute the proceeds of the Marshal's sale to Lorelei unless cause could be shown for a different disposition.

On remand, Guadalupe County intervened and filed a motion for summary judgment and for reformation of the deed. The district court granted summary judgment for the County and ordered the deed reformed to reflect that it transferred Lorelei's interest. Lorelei appealed the district court's order, but we dismissed the appeal on the ground that there was no final judgment. On April 21, 1989, the district court denied Lorelei's motion for reconsideration and entered a final judgment. It is this judgment that Lorelei appeals.

Law of the Case

Appellant Lorelei seeks review of the district court's summary judgment declaration that title to the land is vested in Guadalupe County. Essentially, Lorelei asks the Court to adjudicate the title to the land. Examination of the record and our prior panel opinion, however, indicates that the ultimate question of title to the property was before the Court in the earlier appeal. We must, therefore, consider the law of the case doctrine and its effect upon our review in the present appeal.

It is established that "a decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal. . . ." *Goodpasture, Inc. v. M/V POLLUX*, 688 F.2d 1003, 1005 (5th Cir.1982), *cert. denied*, 460 U.S. 1084, 103 S.Ct. 1775, 76 L.Ed.2d 347 (1983) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir.1967)). It is likewise established that a prior decision does not establish the law of the case if "the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir.1985) (quoting *White v. Murtha*, 377 F.2d 428, 431).

In our prior decision, we held that Margarita's foreclosure of the first lien extinguished the SBA's second lien, that Lorelei obtained title to the ten acres on June 4, 1982, that the record contained no proof that Lorelei was the alter ego of the original mortgagor, and that the district court had no authority to order the sale of Lorelei's property in the suit brought by the SBA. These findings of fact and conclusions of law are not clearly erroneous and have not been undermined by a change in the law. On these issues, therefore, we are bound by our prior decision under the law of the case doctrine.

In paragraph seven of our prior decision we held:

Margarita and Lorelei were required to post a supersedeas bond pursuant to Fed.R.Civ.P. 62 by the district court in February, 1985. They failed to do so and did not seek a stay of the order of sale. By this time they were clearly parties to the case and when the property was sold by the Marshal in April of 1985, Lorelei was divested of the title to the property; and the title was then vested in the purchaser, who is said to be Guadalupe County. The proceeds of that sale are in the hands of the court.

Guadalupe County suggests that paragraph seven trumps the rest of the decision and establishes the law of the case in the County's favor. Paragraph seven, however, is not binding as the law of the case because its finding that Lorelei was a party to the suit is clearly in error. Neither Lorelei nor Margarita was named as a defendant in the SBA's suit. Neither Lorelei nor Margarita participated in the trial before the judgment was rendered. The record discloses no service of process on Margarita or Lorelei at any time while the case was in the district court. Furthermore, the district court's docket sheets indicate unequivocally that contrary to the finding in paragraph seven Lorelei was not a party to the SBA suit in February 1985 when Lorelei was ordered to post the supersedeas bond. Lorelei had neither intervened nor been made a party in the district court. None-

theless, as a non-party affected by the judgment, Lorelei was entitled to appeal in order to protect its interests. See *United States v. Chagra*, 701 F.2d 354, 359 (5th Cir. 1983) (citing with approval e.g. *SEC v. Lincoln Thrift Ass'n.*, 577 F.2d 600, 602-03 (9th Cir.1978) and *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 623-24 (2nd Cir.1934), allowing appeals by non-party creditors who assert rights in receivership proceedings; as well as *Brown v. Board of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) and *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir.1972), allowing appeals by non-parties who are named in injunctions). It would be manifestly unjust for a court to order a property owner not a party to a lawsuit to post a supersedeas bond in the amount of the judgment in the suit to avoid execution upon the property. We must conclude, therefore, that paragraph seven does not establish the law of the case and is not binding on the Court in the present appeal.

Bound as we are by the portion of the earlier opinion that establishes the law of the case, we hold that Margarita's June 1, 1982 foreclosure extinguished the SBA's second lien. Lorelei, as transferee of Margarita, took good title that was not divested by the Marshal's sale. Lorelei, therefore, has title to the land. We reverse the district court's grant of summary judgment that awarded title to Guadalupe County.

On remand, the district court shall return to Guadalupe County the proceeds of the Marshal's void sale that are in the registry of the court.

We note that Guadalupe County apparently has made substantial improvements to the land. Lorelei and the County must now decide whether Lorelei will retain title and compensate the County for the improvements, will sell the tract to the County at a negotiated price, or will relinquish the land through condemnation for its current market value without improvements. We reverse for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-5556

UNITED STATES OF AMERICA,
Plaintiff,
versus

VAHLCO CORPORATION, *et al.,*
Defendants,

LORELEI CORPORATION,
Intervenor-Appellant,

versus

GUADALUPE COUNTY,
Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(April 11, 1990)

Before CLARK, Chief Judge, POLITZ, and WILLIAMS,
Circuit Judges.

PER CURIAM: ¹

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on

The United States has filed a petition for rehearing in *United States v. Vahlco*, 895 F.2d 1070 (5th Cir. 1990). We deny the rehearing, but we briefly respond to the assertions of the United States in its petition.

Contrary to the claim made by the United States, our decision in this case had no effect whatsoever on the status of the United States as a judgment creditor of Vahlco Corporation and Magnum Machine and Tool Corporation. The legal effect on the United States of the foreclosure by Lorelei of the property in question, which had the effect of extinguishing the second lien of the Small Business Administration, had already been settled by our earlier prior unpublished opinion in this case. In that opinion, which established the law of the case on this issue, we held that the SBA lien was junior to the one which Lorelei foreclosed. That holding went on to recognize that it did not in any way adjudicate whatever claims the United States had against Vahlco, Magnum Machine and Tool, and Lorelei. It merely recognized that the foreclosed Lorelei lien was primary and that the secondary lien of the SBA was extinguished.

In that earlier opinion, we expressly recognized:

It may be that as a result of some other proceeding a trustee in bankruptcy will in time assert that all of the property of Margarita and Lorelei are part of the estate of a bankruptcy debtor. It might also be possible for the United States to establish its claim to the property on the grounds of the rule of law stated immediately above [where the mortgagor is also the purchaser at the foreclosure of a senior lien]. However, the present record contains neither pleading nor proof of such a claim.

the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal professions." Pursuant to that Rule, the court has determined that this opinion should not be published.

Further, we pointed out that the United States claimed fraud, but there had been no effort to justify such contention by pleading or proof in this case.

That earlier decision stated the law of the case as to SBA and the United States. The decision as to which the United States now moves for rehearing had no effect whatsoever on the rights of the United States and the SBA, since it had already been held that the foreclosure sale had extinguished the SBA's second lien. All that we held in the opinion which is the subject of the petition for rehearing by the United States is that title to the land lies in Lorelei as opposed to the claim of title by Guadalupe County.

The petition for rehearing by the United States is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2617

D.C. Docket No. SA-76-CA-106

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

VAHLCO CORPORATION, *et al.,*
Defendants,
MARGARITA OIL COMPANY, LTD.,
and LORELEI CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

Before REAVLEY and JOLLY, Circuit Judges, and
SANDERS*, District Judge.

JUDGMENT

[Filed Nov. 25, 1985]

This cause came on to be heard on the record on appeal
and was argued by counsel;

* District Judge of the Northern District of Texas sitting by
designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order appealed from the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

October 16, 1985

Issued as Mandate: Nov. 22, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2617

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

VAHLCO CORPORATION, *et al.,*
Defendants,
MARGARITA OIL COMPANY, LTD.,
and LORELEI CORP.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(October 16, 1985)

Before REAVLEY and JOLLY, Circuit Judges, and
SANDERS*, District Judge.

PER CURIAM:**

* District Judge of the Northern District of Texas sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

We reverse the October 9, 1984 order of the district court directing the sale of ten acres owned by Lorelei Corporation, because of the following:

1. It is conceded that the United States has held a lien that was junior to the one originally owned by Seguin Savings Association. Under the evidence in this record that senior lien was owned on June 1, 1982 by Margarita Oil Company.
2. When this senior lien was foreclosed by private sale through the trustee on June 1, 1982, the junior lien of the United States was extinguished. *Diversified Mortgage Investors v. Lloyd D. Blaylock, etc.*, 576 S.W.2d 794, 808 (Tex. 1978); *Irving Lumber Co. v. Alltex Mortgage Co.*, 468 S.W.2d 341, 344 (Tex. 1971); *Jeffrey v. Bond*, 509 S.W.2d 563, 565 (Tex. 1974).
3. The record on appeal indicates that the record title to this ten acres was obtained by Lorelei Corporation on June 4, 1982.
4. Under Texas law where the mortgagor is the purchaser at the sale accompanying the foreclosure of a senior lien, the junior lien remains unaffected. *See Clearman v. Graham*, 4 S.W.2d 581, 583 (Tex. Civ. App.—Austin 1928), *writ diss'd*, 14 S.W.2d 819, *reh'g denied*, 16 S.W.2d 522 (Tex. Comm'n App. 1929); *Buckner v. Buckner*, 51 S.W.2d 769, 771 (Tex. Civ. App.—Dallas 1932, no writ); *see also Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158 (1943); 59 C.J.S. Mortgages § 577 at 973 (1949).

There is some contention by the United States that the claim has been made in an adversary proceeding in a bankruptcy case pending in the Southern District of Texas to the effect that both Margarita Oil Company and Lorelei Corporation have been alter egos of the original mortgagor of this property. It may be that as the result of

some other proceeding a trustee in bankruptcy will in time assert that all of the property of Margarita and Lorelei are part of the estate of a bankruptcy debtor. It might also be possible for the United States to establish its claim to the property on the grounds of the rule of law stated immediately above. However, the present record contains neither pleading nor proof of such a claim.

5. The trial court stated no reason or justification in its order of October 9, 1984 directing the sale of property of which Lorelei Corporation is the record owner and purporting to transfer its title at the suit of the United States, a creditor of the original mortgagor.
6. The United States makes a number of arguments in this court that do not help its cause. It claims that the October 9, 1984 order is not appealable, even though that order directed the final disposition of this real property for which there was no other review. It argues that the appeal in *United States v. Vahlco Corp.*, 720 F.2d 885 (5th Cir. 1983), had *res judicata* or preclusive effect against Margarita and Lorelei, but the issue in that appeal was limited to the rights of the United States against parties other than Margarita or Lorelei. It argues that Margarita's foreclosure of its senior lien was void for lack of notice to the junior lienholder, even though junior lienholders are not entitled to notice of private foreclosure by senior lienholders. It argues that private foreclosure was improper once the judicial foreclosure had been commenced by the United States, but this rule would have an application only if the owner of the senior lien had commenced judicial foreclosure. And, finally, it argues that Margarita and Lorelei are guilty of fraud, al-

though there has been no effort to justify such a contention by pleading or proof in the district court.

7. Margarita and Lorelei were required to post a supersedeas bond pursuant to Fed.R.Civ.P. 62 by the district court in February, 1985. They failed to do so and did not seek a stay of the order of sale. By this time they were clearly parties to the case and when the property was sold by the Marshal in April of 1985, Lorelei was divested of the title to the property; and the title was then vested in the purchaser, who is said to be Guadalupe County. The proceeds of that sale are in the hands of the court.
8. We remand the case with directions to the district court to deliver the proceeds to Lorelei Corporation unless cause be shown to that court for further proceedings and/or a different disposition of the proceeds.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-76-CA-106

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FREDERICK H. VAHLSING, JR.,
VAHLCO CORPORATION,
MAGNUM MACHINE & TOOL CORP.,
Defendants,

and

MARGARITA OIL CO., LTD. and LORELEI CORP.,
Defendants.

ORDER

[Filed Apr. 21, 1989]

On the 21st day of February, 1989 came on for hearing the Motion for Reconsideration by Lorelei Corporation in which the court is asked to reconsider and rescind its order of October 6, 1987 granting summary judgment to Guadalupe County and ordering reformation of the United States Marshal's Deed, and the motion by intervener, Guadalupe County, under Rule 54(b), to direct the entry of a final judgment in favor of Guadalupe County against Lorelei Corporation, and to certify that there is no just reason for delay. After hearing the arguments of counsel, considering the pleadings of record and the law, the court is of the opinion that the order entered by this court on October 6, 1987 granting summary judgment in favor of Guadalupe County and

ordering reformation of the deed is proper in all respects and therefore Lorelei Corporation's Motion for Reconsideration should be and it is hereby denied.

The court is of the further opinion that intervenor's motion for entry of final judgment is well taken. It is therefore expressly determined that there is no just reason for delay, and it is expressly directed that a final judgment herein be entered as follows:

IT IS HEREBY ADJUDGED and ORDERED that the motion of intervenor, Guadalupe County, for summary judgment against Lorelei Corporation be and is hereby GRANTED in its entirety.

IT IS FURTHER ORDERED that the United States Marshal's deed dated May 23, 1985, executed by William J. Jonas, Jr., United States Marshal for the Western District of Texas, in favor of Guadalupe County, State of Texas, such deed being of record in Vol. 738, page 1407 *et seq.* of the Deed Records of Guadalupe County, Texas, divested Lorelei Corporation of any title it had to the property covered thereby, and that title to such property was thereby vested in Guadalupe County, free and clear of any claim by Lorelei Corporation.

IT IS FURTHER ORDERED that the motion of intervenor, Guadalupe County, for reformation of deed be and is hereby GRANTED in its entirety.

IT IS NOTED that in order to effectuate this court's order of October 6, 1987, as well as the amended judgment and the order of sale pursuant to which the Marshal's deed was executed, the United States Marshal has prepared, executed, and delivered a reformation deed dated May 23, 1985 and acknowledged December 17, 1987 in favor of Guadalupe County which is in lieu of and effective as of the date of the original deed of May 23, 1985, and conveys all the right, title, interest, and claim which Vahlco Corporation, Fred H. Vahlsing, Jr., Magnum Machine and Tool Corporation, Margarita Oil

Company, Ltd., and Lorelei Corporation, defendants, on the day of judgment, June 11, 1982, had in and to the land covered by said deed, which such action is hereby approved.

SIGNED AND ENTERED this 21 day of April, 1989,
at 9:48 o'clock a.M.

/s/ Emilio M. Garza
EMILIO M. GARZA
District Judge

JRLjr/miw/139

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Cause No. SA-76-CA-106

UNITED STATES OF AMERICA,
Plaintiff,

v.

FREDERICK H. VAHLSING, JR., VAHLCO CORPORATION,
MAGNUM MACHINE & TOOL CORP.,

and

MARGARITA OIL CO., LTD. AND LORELEI CORP.,
Defendants.

ORDER

[Filed Oct. 6, 1987]

On this date came on to be considered the January 21, 1987 Motion of Lorelei Corporation to Reconsider and Dismiss Cross-Claim and Motion of Guadalupe County to Intervene as a Defendant; the February 10, 1987, Motion by Intervenor, Guadalupe County, for Summary Judgment; the March 4, 1987, Motion by Lorelei Corporation for Rule 11 Sanctions; the March 11, 1987 Supplemental Motion of Lorelei Corporation for Rule 11 Sanctions; and the August 24, 1987 Motion of Intervenor, Guadalupe County, for Reformation of Deed, all in the above-styled and numbered cause.

This cause was originally brought by the United States of America on behalf of the Small Business Administration in an attempt to recover on a note and to enforce certain obligations of F. H. Vahlsing, Jr. The present

issue in all of the above motions is whether Lorelei Corporation or Guadalupe County owns a certain 10-acre parcel of real estate in Guadalupe County, which this Court ordered sold by the United States Marshal. Although the underlying cause of action is complicated and presents many issues, the present issue under consideration, the owner of the certain 10 acre tract of land, is not complex and is easily resolved in favor of Intervenor, Guadalupe County.

During the course of proceedings against F. H. Vahlsing, Jr., this Court, by Order filed October 9, 1984 (Docket No. 156), ordered that the 10-acre parcel of land should be sold and the proceeds placed in escrow pending determination of who was entitled to the funds. Whether right or wrong¹ the Court ordered the property sold. Here, it is evident that at all relevant times, Lorelei Corporation was a party in this action. Lorelei Corporation first appeared in this proceeding on November 18, 1983, when it and Margarita Oil Company Ltd., filed a motion for a hearing. *See* Docket No. 151. After the Court ordered the property sold, the Court provided Lorelei Corporation and Margarita Oil Company Ltd., and any other party in the action, an opportunity to post a supersedeas upon and to stay the foreclosure sale pending appeal. *See* this Court's February 25, 1985 Order (Docket No. 166). After no bond was filed by any Defendant within the time period set forth in the Order, the United States Marshal proceeded to foreclose upon the property.² The Court then ordered that the Clerk

¹ *See United States v. Vahlco*, Cause No. 84-2617 p 5 (5th Cir. October 16, 1985):

The trial court stated no reason or justification in its order of October 9, 1984 directing the sale of property of which Lorelei Corporation is the record owner and purporting to transfer its title

² On June 4, 1985, the United States Marshal filed his return showing that on April 23, 1985, the sale had been conducted. Docket No. 168.

place into the Registry of the Court the net proceeds of the sale and place it in an interest-bearing account pending the determination of where to deliver the proceeds. June 19, 1985 Order (Docket No. 169). Accordingly, after this Court had ordered that the certain 10-parcel acre of real estate be sold, Lorelei Corporation, clearly a party to the proceeding, had every opportunity to post a supersedeas bond to stay the foreclosure sale pending appeal. Lorelei Corporation, however, chose not to do so and the property was sold wherein the County of Guadalupe was the highest bidder. Consequently, Guadalupe County is entitled to summary judgment in its favor on its motion entitling it to the property in question. This result, although it may or may not be controlled by the October 16, 1985 opinion of the Fifth Circuit in this cause, is entirely consistent with that opinion. The Fifth Circuit recognized that

the record title to this 10 acres was obtained by Lorelei Corporation (p 3) . . . Lorelei Corporation is the record owner (p 5) . . . Margarita and Lorelei were required to post a supersedeas bond pursuant to Fed.R.Civ.P. 62 by the district court in February, 1985. They failed to do so and did not seek a stay of the order of sale. By this time they were clearly parties to the case and when the property was sold by the Marshal in April of 1985, Lorelei was divested of the title to the property; and the title was then vested in the purchaser, who was said to be Guadalupe County. The proceeds of that sale are in the hands of the court (p 7) . . . We remand the case with the directions to the district court to deliver the proceeds to Lorelei Corporation . . . (p 8).

United States v. Vahlco Corp., Cause No. 84-2617 pp 5, 7 & 8 (5th Cir. October 16, 1985).

Based on the record and file in this cause, it is clear that Guadalupe County is entitled to the property. The

only point of confusion is that the Marshal erroneously conveyed the right, title, and interest of Vahlco Corporation, which, as of the day of the sale, was absolutely nothing. However, this Court's October 9, 1984, Order setting foreclosure sale specifically set forth that the United States Marshal should sell the certain 10-acre parcel of land and then set forth its legal description. The Court did not say that the Marshal was to sell the interest of Vahlco Corporation. Accordingly, all parties were well aware that it was all right, title and interest in the property which was to be sold. All right, title and interest in the property was then sold at the public sale on April 23, 1985. The only inconsistency is that the May 23, 1985, Marshal's deed erroneously stated that it conveyed only the interest of Vahlco Corporation, and not the interest of any other Defendant in the action. Accordingly, the Court will grant the Intervenor's motion for reformation of deed. Therefore,

IT IS HEREBY ORDERED that the motion of Lorelei Corporation to reconsider and dismiss cross-claim and motion of Guadalupe County to intervene as a Defendant and is hereby DENIED.

IT IS FURTHER ORDERED that the motion of Intervenor, Guadalupe County, for summary judgment be and is hereby GRANTED in its entirety.

IT IS FURTHER ORDERED that the United States Marshal's deed dated May 23, 1985, executed by William J. Jonas, Jr., United States Marshal for the Western District of Texas, in favor of Guadalupe County, State of Texas, such deed being of record in Vol. 738, page 1407 *et seq.* of the deed records of Guadalupe County, Texas, divested Lorelei Corporation of any title it had to the property covered thereby, and that title to such property was thereby vested in Guadalupe County, free and clear of any claim by Lorelei Corporation.

IT IS FURTHER ORDERED that the motion of Lorelei Corporation for Rule 11 sanctions be and is hereby DENIED.

IT IS FURTHER ORDERED that the supplemental motion of Lorelei Corporation for Rule 11 sanctions be and is hereby DENIED.

IT IS FURTHER ORDERED that the motion of Intervenor, Guadalupe County, for reformation of deed be and is hereby GRANTED in its entirety.

IT IS FURTHER ORDERED that to effectuate this Order, as well as the amended judgment and the order of sale pursuant to which the Marshal's deed was executed, that the United States Marshal prepare, execute, and deliver a reformation deed in favor of Guadalupe County which will be in lieu of and effective as of the date of the deed of May 23, 1985, and will convey all the right, title, interest, and claim which Vahlco Corporation, Fred H. Vahlsing, Jr., Magnum Machine and Tool Corporation, Margarita Oil Company, Ltd. and Lorelei Corporation, Defendants, on the day of judgment, June 11, 1982, had in and to the land covered by said deed.

IT IS FURTHER ORDERED that Intervenor, Guadalupe County, is granted leave to file any additional proposed findings of fact and conclusions of law, should it deem it warranted, to effectuate this order. Such proposed findings of fact and conclusions of law shall be filed on or before ten (10) days of the filing of this order.

SIGNED and ENTERED this 6th day of October, 1987, at 10 am.

/s/ William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Cause No. SA-76-CA-106

UNITED STATES OF AMERICA,
Plaintiff,

v.

VAHLCO CORPORATION, *et al.,*
Defendants.

ORDER

[Filed Feb. 25, 1985]

ON THIS DATE came on to be considered the motion of the Plaintiff for a supersedeas bond filed pursuant to Rule 62 of the Federal Rules of Civil Procedure.

On October 9, 1984, this Court entered an Order granting the Plaintiff's motion to reset a foreclosure sale on property owned by the Appellants. That sale was to take place on December 4, 1984, however, on November 9, 1984, this Court granted the Appellants' motion to stay the sale of that property pending their appeal of this Court's Order to the Fifth Circuit. No bond was posted by the Appellants pending their appeal and the Appellee now seeks to have such a bond required.

The Plaintiff filed its motion on January 15, 1985. The Appellants have not responded to the Plaintiff's motion and thus this Court, after considering the Plaintiff's motion, is of the opinion that the motion is well taken and should be granted. This Court notes that it is the burden of the appealing party to demonstrate that a supersedeas

bond is not required under the circumstances. *Poplar Grove, Etc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). This Court agrees with the Plaintiff that the amount of the bond should be \$250,000 as that is the amount that the Appellants have demonstrated was offered as a purchase price for the property in question. This Court will not, however, add an additional \$5,000 to the amount which the Appellants must post as bond to cover the Plaintiff's costs and attorney's fees on appeal. This Court does not believe that attorney's fees are encompassed within Rule 62 of the Federal Rules of Civil Procedure. Therefore,

IT IS HEREBY ORDERED that the Appellants in this cause post a supersedeas bond in the amount of \$250,000 pursuant to Rule 62 of the Federal Rules of Civil Procedure and that in the event that the Appellants are unsuccessful in their appeal, that said bond shall be used to supplement the proceeds of any sale of the property in question to the extent that the proceeds from that sale fall below the amount of the bond posted by the Appellants.

IT IS FURTHER ORDERED that if the Appellants do not post the bond required within ten (10) days of the entering of this Order, the stay on the foreclosure sale imposed by this Court's Order of November 14, 1984, shall be lifted.

SIGNED and ENTERED this 22nd day of February, 1985, at 4:30 p.m.

/s/ William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Cause No. SA-76-CA-106

UNITED STATES OF AMERICA,
Plaintiff,

v.

VAHLCO CORPORATION, et al.,
Defendants.

ORDER

[Filed Oct. 9, 1984]

On this date came on to be considered the motion of the Plaintiff for the resetting of a foreclosure sale.

A hearing was held on this matter on February 2, 1984. After reviewing the record and file in this cause and considering the matters presented to this Court at the hearing, this Court is of the opinion that the Plaintiff's motion should be granted and that the sale of the property located in Seguin, Texas should take place with the proceeds of such sale to be placed in escrow pending the determination of whether Margarita Oil Company, Ltd. and Lorelei Corporation are in fact alter egos of the Defendant Frederick Henry Vahlsing, Jr. Therefore,

IT IS HEREBY ORDERED that the United States Marshall shall seize and sell at public auction in accordance with Title 28, United States Code, Sections 2001 and 2002, the following property:

Ten (10) acres of land situated in the Humphries Branch Survey, A-6, Guadalupe County, Texas. Said

10-acre tract of land is part of a tract called 97 acres and conveyance from Paula B. Baese to J. D. Jamison recorded in Volume 347 at page 365 of the Deed Records of Guadalupe County, Texas, and is described by metes and bounds as follows:

BEGINNING at the intersection of the West line of said 97-acre tract and the North right-of-way line of Interstate Highway No. 10:

THENCE with the East line of a road North 1 degree 17 minutes West 836.7 feet to an iron stake set for the Northwest corner of the tract herein described;

THENCE North 88 degrees 43 Minutes East 490.4 feet to an iron stake set for the Northeast corner of the tract herein described;

THENCE South 1 degree 17 minutes East 864.1 feet to an iron stake set in the North right-of-way line of Interstate Highway No. 10;

THENCE with North line of Interstate Highway No. 10 South 81 degrees 00 minutes West 400 feet to a concrete right-of-way marker;

THENCE continuing with said line North 50 degrees 32 minutes West 124.1 feet to the place of beginning, and being the same property heretofore conveyed by J. D. Jamison et ux to Vahlco Corporation by deed dated October 7, 1970, and recorded in Guadalupe County Deed Record Volume 436 on page 193, and

Each and all of the hereinabove or hereinafter mentioned or referred to instruments or plats and their records, where and when recorded, are hereby expressly incorporated herein and made a part hereof for descriptive purposes, together with all furniture and fixtures therein and included all buildings and structures thereon, and all equipment located at the premises.

That notice shall be published once a week for at least four (4) weeks prior to the sale in at least one (1) newspaper regularly issued and of general circulation in Guadalupe County, Texas. Said notice shall describe the property as set out above and shall contain the terms and conditions of sale as set out herein.

That the terms and conditions of the sale shall be as follows:

a. The property shall be sold as a whole or as separate parcels or pieces at public sale at Guadalupe County, Seguin Courthouse in Seguin, Texas.

b. The United States may bid a credit against the judgment and interest thereon, costs and expenses without tender of cash, as provided by Title 31, United States Code, Section 3715.

c. The terms of sale as to all other persons or parties bidding shall be cash. The successful bidder, called purchaser herein, shall be required to deposit with the United States Marshal cash equal to twenty percent (20%) of his total bid immediately upon the property being struck off and awarded to him as the highest and best bidder; and the remaining eighty percent (80%) of said purchase price to be paid on or before 5:00 p.m., 30 days inclusive from the date of sale. Should any person bid off property at sale by virtue of the Judgment and this Order of Sale, and fail to comply with the terms of sale, he shall be liable to the United States for twenty percent (20%) of the value of the property thus bid off as a penalty, besides costs, to be recovered on motion, five (5) days notice of such motion being given to such purchaser and said deposit by purchaser shall be paid over and delivered to the United States to be applied toward payment of said penalty, but payment of said penalty by purchaser shall not be a credit on the judgment of the United States against the Defendants; and should the property on second sale bring less than on the former, the defaulting pur-

chaser at first sale shall be liable to pay the Defendants as judicial sale all loss which he sustains, including the amount of the difference between the bid at the first sale and bid under which the property finally sold, to be recovered on motion.

d. The United States Marshal shall make his report of sale within ten (10) days from the date of sale, by returning to the Clerk a copy of this order with a recitation at the bottom of the order that the Marshal has executed the sale.

e. If no objections have been filed in writing in this cause with the Clerk of the Court, by 10:00 a.m., fifteen (15) days inclusive from date of sale, the sale shall be confirmed without necessity of motion, or upon motion of the United States, the purchaser, any party in interest in this cause, or by the Court upon its own motion, and the United States Marshal shall be directed to deliver his deed to said purchaser.

The United States Marshal shall apply the proceeds of sale, first to expenses of sale, then to the outstanding first real estate lien in the amount and to the party as established by this Court, said proceeds to be held in an interest-bearing escrow account by the Clerk of this Court, pending further order of this Court, and the balance of proceeds from the sale then to be applied to Plaintiff's cost in this suit, and then to the payment and satisfaction of this judgment as set forth herein. If the proceeds of such sale be insufficient to satisfy the judgment, interest thereon, and all costs, then the United States Marshal executing the order of sale shall take the money, or any balance thereof remaining unpaid, out of any other property of the Defendant Vahlco Corporation, as in the case of ordinary execution. If the property shall sell for more than sufficient to pay off and satisfy said sums of money and judgment, then the Marshal shall be directed to pay over the excess to the Defendant, Magnum Machine and Tool Corporation.

30a

SIGNED and ENTERED this 9th day of October,
1984, at 10:15 A.m.

/s/ William S. Sessions
WILLIAM S. SESSIONS
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-5556

UNITED STATES OF AMERICA,
Plaintiff,

versus

VAHLCO CORPORATION, *et al.*,
Defendants,

LORELEI CORPORATION,
Intervenor-Appellant,

GUADALUPE COUNTY,
Intervenor-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(April 11, 1990)

Before CLARK, Chief Judge, POLITZ and WILLIAMS,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause by Guadalupe
County be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Williams
United States Circuit Judge